FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 11 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941

No. 939

OVERNIGHT MOTOR TRANSPORTATION COMPANY, INC.,

*Petitioner,*

VERSUS

WILLIAM H. MISSEL,

*Respondent.*

## PETITION OF OVERNIGHT MOTOR TRANSPORTATION COMPANY, INC. FOR A WRIT OF CERTIORARI TO THE HONORABLE THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT OF SAID PETITION FOR A WRIT OF CERTIORARI.

JOHN R. NORRIS,

J. NINIAN BEALL,

Attorneys for Petitioner.

February 7, 1942.

The Daily Record Co. Print, Baltimore.

# SUBJECT INDEX.


| | PAGE |
|---|---|
| PETITION FOR WRIT OF CERTIORARI | 1 |
| Opinions below | 2 |
| Statutes Involved | 2 |
| Jurisdiction | 2 |
| Questions presented | 3 |
| Statement | 4 |
| Reasons for Granting the Writ | 6 |
| BRIEF IN SUPPORT OF PETITION FOR CERTIORARI | 11 |
| History of this litigation | 11 |
| Construction of Section 7—Maximum Hours | 14 |
| Right of contract | 17 |
| Penalties under the Act | 22 |
| Dual Functions of the Administrator and of the Interstate Commerce Commission | 25 |
| CONCLUSION | 27 |
| APPENDIX | 29 |


## CITATIONS

*Cases:*


| | |
|---|---|
| Allen v. Moe, (D. C. Idaho, 12/10/41) 5 Wage Hour Rept. 71 | 15 |
| Bechtel v. Stillwater Milling Co., 33 F. Supp. 1010 | 27 |
| Bowie, et al., v. Gonzalez, et al., 117 F. (2d) 11 | 16 |
| Bumpus v. Continental Baking Co. (C. C. A. 6th, 12/10/41) 4 Wage Hour Rept. 692 | 14, 16 |
| Chesapeake & Ohio Ry. Co. v. Conley, 230 U. S. 513 (1912) | 24 |

PAGE

Dubois Soap Co. v. Floyd (C. A. Ohio, 9/15/41), 4 Wage Hour Rept. 541 ..... 14

Ex Parte MC-2 and MC-3 (3/4/41), 28 M. C. C. 125 ..... 12

Ex Parte Young, 209 U. S. 123 (1908) ..... 24

Faulkner v. Little Rock Furn. Mfg. Co., 32 F. Supp. 590 ..... 27

Federal Trade Commission v. Millers National Federation, 23 F. (2d) 968 (1927) ..... 23

Fleming v. A. H. Belo (C. C. A. 5th, 1941), 121 F. (2d) 207 ..... 14, 16

Fleming v. Atlantic Co., 40 F. Supp. 654 ..... 14

Fleming v. Carleton Screw Products Co., 37 F. Supp. 754 ..... 15

Fleming v. Pearson Hardwood Flooring Co., 39 F. Supp. 300 ..... 15

Fleming v. Stone, 41 F. Supp. 1000 ..... 14

Franco, et al., v. Seas Shipping Corp., 272 Fed. 542 (D. C., Md., 1921) ..... 23

Gerdert v. Certified Poultry & Egg Co., 38 F. Supp. 964 ..... 27

Gibson v. Wilson (D. C., Tenn., 3/20/41), 4 Wage Hour Rept. 259 ..... 27

Great Northern Ry. Co. v. Merchants Elevator Co., 259 U. S. 285 ..... 26

Gurtov v. Volk, 11 N. Y. S. (2d) 604 ..... 14

Haddad v. Beckerman Shoe Corp. (C. P. Berks Co., Pa. 5/5/41), 4 Wage Hour Rept. 329 ..... 15

McLendon v. Bewley Mills (N. D. Tex. 12/10/40), 4 Wage Hour Rept. 30 ..... 15

McClure & Schulze Baking Co., (C. C. Winnebago Co., Ill., 11/21/41) 5 Wage Hour Rept. 53 ..... 15

Meyer v. Dollar S. S. Line, 43 F. (2d) 425 (D. C. Wash., 1930) ..... 23

Missel v. Overnight Motor Transportation Co., Inc., 36 F. Supp. 980 ..... 2, 12

PAGE

Missel v. Overnight Motor Transportation Co., Inc., 40 F. Supp. 174 ..... 2, 12

Missel v. Overnight Motor Transportation Co., Inc., (C. C. A. 4th, 1/5/42), 5 Wage Hour Rept. 25 ..... 2, 16, 24

Mitchell Coal & Coke Co. v. Pennsylvania R. R., 230 U. S. 247 ..... 26

Muldowney v. Seaberg Elevator Co., 39 F. Supp. 275 ..... 15

O'Hara, et al., v. Luckenbach S. S. Co., 16 F. (2d) 681 (C. C. A., 1926) ..... 23

Oklahoma Operating Co. v. Love, et al., 252 U. S. 331 (1920) ..... 24

Pacific Mail S. S. Co. v. Ed. Schmidt, 241 U. S. 245 (1916) ..... 23

Reeves v. Howard County Refining Co., 33 F. Supp. 90 ..... 14

Schlee v. Lincoln Oil Co. (C. C. Wayne Co., Mich. 12/31/41) 5 Wage Hour Rept. 72 ..... 14

St. John v. Brown, 38 F. Supp. 385 ..... 15

St. Louis Iron Mountain & S. Ry. Co. v. Williams, et al., 251 U. S. 63 (1919) ..... 24

Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426 ..... 26

The Cubadist, 252 Fed. 658 (D. C. Ala., 1918) ..... 23

The Geo. W. Wells, 118 Fed. 761 (D. C. Mass., 1902) ..... 23

The Silver Shell, 255 Fed. 340 (D. C. N. Y., 1918) ..... 23

The Sunshine Anthracite Coal Co. v. Homer M. Adkins, 310 U. S. 381 (1940) ..... 24

Tinerella v. Des Moines Transp. Co., 41 F. Supp. 798 ..... 27

Uebersee Finanz-Korporation, etc., v. Rosen, 83 F. (2d) 225 (1936) ..... 23

U. S. v. American Trucking Ass'ns, Inc., (May 27, 1940), 310 U. S. 534 ..... 11, 25

U. S. v. American Trucking Ass'ns, Inc., (Rehearing denied 10/14/40) 311 U. S. 724 ..... 12

U. S. v. Darby Lumber Co., 312 U. S. 100 ..... 16

PAGE

Wadley-Southern Ry. Co. v. Georgia, 235 U. S. 651 (1915) ..... 24

Warren-Bradshaw Drilling Co. v. Hall, (C. C. A. 5th, 12/9/41), 4 Wage Hour Rept. 695 ..... 14, 16

West v. Smoky Mountains Stages, Inc., 40 F. Supp. 296 ..... 27

Williams v. General Mills, 39 F. Supp. 849 ..... 15

Woods v. Wilkerson, 40 F. Supp. 131 ..... 14

*Statutes:*

Fair Labor Standards Act of 1938 (29 U. S. C. A. 201, et seq.) ..... 2, 29

Section 2 ..... 29

" 6 ..... 29

" 7 ..... 30

" 8 ..... 31

" 13 ..... 2, 32

" 16 ..... 33

Interstate Commerce Act, Part II (49 U. S. C. A. 301, et seq.) ..... 2, 33

Section 204 ..... 2, 33

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941

---

No.

---

OVERNIGHT MOTOR TRANSPORTATION COMPANY, INC.,

*Petitioner,*

VERSUS

WILLIAM H. MISSEL,

*Respondent.*

---

## PETITION OF OVERNIGHT MOTOR TRANSPORTATION COMPANY, INC. FOR A WRIT OF CERTIORARI TO THE HONORABLE THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

---

*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

The Petition of Overnight Motor Transporation Company, Inc., a corporation organized and doing business under the laws of the State of Maryland, with its principal office at Baltimore, in said State, respectfully presents this application for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fourth Cir-

cuit entered on January 5, 1942, reversing the decision of the United States District Court for the District of Maryland, filed July 28, 1941, and remanding the case with directions to enter judgment for the Plaintiff.

---

## OPINIONS BELOW

The opinion of the District Court overruling Defendant's motion to dismiss (R. 5 ) is reported in 36 F. Supp. 980, and the opinion granting judgment for Defendant on the merits (R. 27 ) in 40 F. Supp. 174. The opinion and judgment of the Circuit Court of Appeals (R. 56 ) is reported in 5 Wage Hour Rept. 25 (C. C. A. 4th, 1-5-42).

---

## STATUTES INVOLVED

The statute which is directly involved in these proceedings is the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060 et seq., 29 U. S. C. A. 201 et seq., hereinafter sometimes referred to as the Act. Section 13 (b) (1) of this Act includes reference to the provisions of Section 204 of the Motor Carrier Act, 1935 (now Interstate Commerce Act, Part II), c. 498, 49 Stat. 546 et seq., 49 U. S. C. A. 304, and this latter statute is involved in some of the questions presented. The relevant provisions of these two statutes are set forth in the Appendix.

---

## JURISDICTION

The jurisdiction of this Honorable Court is invoked under Section 240 (a) of the Judicial Code, as amended (28 U. S. C. A. 347).

The opinion of the Circuit Court of Appeals for the Fourth Circuit was filed January 5, 1942. Application for

a stay of the mandate pending this application for a writ of certiorari was duly made and on January 30, 1942 an order staying the mandate for thirty days was entered by the Court below in order to enable Petitioner to apply to this Honorable Court to review said judgment of the United States Circuit Court of Appeals for the Fourth Circuit.

---

## QUESTIONS PRESENTED

(1) Does the Fair Labor Standards Act, through its minimum wage provisions, Section 6, and its maximum hour provisions, Section 7, have the effect of establishing a divided or dual classification or coverage of employees? Section 6 is clearly limited to fixing minimum wages for a large group of low-wage earners. Section 7 clearly increases the income and tends to establish maximum hours for the group of employees covered by Section 6, but, does Section 7 go further and increase earnings and establish maximum hours for all other classes of employees, regardless of salary, need for federal protection, and the national economic changes which vary from time to time?

(2) Does the Act entirely destroy the right of private contract to fix a guaranteed weekly or monthly lump sum compensation which is far in excess of the minimum wage provisions, or does the Act merely limit this right by establishing a minimum wage floor below which the parties may not contract?

(3) Are the penalty provisions of the Act mandatory or discretionary with the courts in view of the good faith litigation of the parties?

(4) Where applicable, the Act is contingent upon certain factual determinations by the Interstate Commerce Commission. Can the obligations finally established be made retroactive, together with penalties?

---

## STATEMENT

The case was tried on complaint, answer, amendment to the complaint, and stipulation of certain facts by the parties. The following are the essential facts (R. 7).

William H. Missel brought this suit under the Fair Labor Standards Act for overtime wages alleged to be due him for hours worked in excess of the maximum number prescribed in Section 7, and for an additional equal amount as liquidated damages as provided in Section 16. He was employed at a regular fixed weekly salary to do a job which necessarily involved irregular, fluctuating periods of work per day, rather than to work on a fixed schedule of hours. In some weeks he worked less than the number fixed in Section 7 and in other weeks considerably in excess of that number. He was paid a uniform salary regardless of whether his duties required short or long hours, and regardless of absent time. He regulated his on-duty hours according to his own judgment as to what was necessary.

He began his employment with Overnight Motor Transporation Company, Inc. on November 26, 1937, prior to the passage of the Act, and from that date until October 31, 1938, he received a salary of $25.50 per week. On the latter date, his salary was increased to $27.50 per week, and he was paid this amount until October 19, 1940 when his employment ceased.

The salary voluntarily agreed upon, paid and accepted as full compensation for his services, at all times, and for

all weeks, was in excess of the statutory minimum wage for straight time, and was in excess of one and one-half times the statutory minimum wage for all overtime worked or on duty.

Petitioner is a common carrier of property in interstate commerce by motor vehicle, and as such is subject to the Interstate Commerce Act, Part II, 49 U. S. C. A. 301, 304.

Respondent's duties were those of a rate clerk, cashier and dispatcher, and all duties were conceded to be "in commerce".

The case concerns the period of approximately two years' employment, from October 24, 1938 to October 19, 1940. Respondent was on duty from a minimum of approximately forty hours per week during slack business to an occasional maximum of approximately seventy-five hours per week during the peak business.

Respondent, after resigning, claimed for the first time that the employment agreement under which he had worked for two years was null and void and in violation of the Act, for the alleged reason that no weekly contract of employment at a fixed salary, regardless of amount, made in advance of the work to be done, can, as a matter of law, comply with both of Sections 6 and 7. This is said to be so because of an assumption that lump sum weekly wages are not constructed upon the mathematical overtime wage formula contemplated by Section 7.

On the assumption that Section 7 cannot be applied without an hourly contract rate under Section 6, it is claimed that the effect of the law is to assign all of the contract salary to a straight time hourly rate in excess of minimum wages, in the alternative (a) for the statutory hours

worked or (b) all of the hours worked, and force the result that no penalty overtime has been paid.

Then the Respondent claims that on the alleged unpaid overtime, determined retroactively as aforesaid, there must be added 100% penalty under Section 16, which Respondent claims is mandatory upon the Court regardless of good faith litigation.

---

## REASONS FOR GRANTING THE WRIT

(1) The primary issue is whether the Fair Labor Standards Act was intended to raise minimum wages of a group of poorly paid employees and also to spread employment among the same group of poorly paid employees; or whether Section 6 of the Act, covering straight time wages, alone had class limitations and Section 7, covering overtime wages, went beyond the class scope of the minimum wage provisions and was intended to spread employment and raise wages among all classes of employees regardless of income.

The Court below erred in assuming that the Act contemplated dual class coverage, limited as to straight time and unlimited as to overtime. The Court also erred in adopting a literal construction of the Act which is at variance with the intent of Congress.

(2) Numerous district courts have divided on the questions presented here and only three circuit courts have passed on any part of the questions which are applicable to interstate industries. When the physical operations of these industries extend beyond the jurisdiction of any one of the judicial circuits, as in this case, these industries are confronted with the conflicting decisions of the district and state courts. The state courts have not consistently

followed either the district courts or the circuit court of the judicial circuit in which the states are located.

This court should take jurisdiction and establish a uniform rule.

(3) This is the only circuit court case presenting the question of a fixed weekly salary as distinguished from an hourly method of pay. In addition, this case presents the question of employment at an agreed stipend for the accomplishment of certain duties which necessarily involve fluctuating and indefinite hours.

The Circuit Court erred in holding that the Act destroyed the private right of contract, instead of construing the Act as having the effect of placing a minimum wage floor below which employer and employee may not contract.

(4) The Circuit Court decision in this case and some of the district court decisions appear to rest on the assumption that where a contract of employment on a weekly basis did not break the wage down on an hourly basis and specify separately the straight time and overtime rates, there is a legal presumption that the total contract wage did not contemplate or include overtime at a penalty rate and was, therefore, in violation of the provisions of Section 7. This theory of construction is in conflict with the usual and ordinary presumptions that the parties contemplate compliance with the law in their over-all contract.

The Court below erred in applying this novel theory of presumptions in wage contracts.

(5) A related issue is whether the double penalty provisions of Section 16 were mandatory upon and not discretionary with the courts, regardless of good faith litigation. The Circuit Court ruled they were mandatory, and

this interpretation deprived Petitioner of the protection of the "due process" provisions of the Constitution.

The Court below erred in this construction of the Act and the ruling is in conflict with numerous decisions of this Court. This is the only circuit court which has ruled upon the penalty provision of this law.

(6) A secondary issue concerns the conflicting jurisdictions created under the Fair Labor Standards Act and the Interstate Commerce Act, Part II. The District Court held that the courts have jurisdiction to determine which employees are exempt under Section 13 of the Fair Labor Standards Act from the overtime penalty wage provisions of Section 7, without the benefit of a prior determination of the facts related to the exemption provisions by a uniform ruling of the Interstate Commerce Commission. This question involves transportation and was committed to the Commission's jurisdiction under Section 204 of the Interstate Commerce Act, Part II.

The District Court erred in overruling Petitioner's motion to dismiss because the Commission had not, at that time, acted. This ruling was contrary to the decisions of this Court.

On final hearing, both the District and Circuit Courts erred in failing to appreciate the legislative function of the Commission as implementing the Fair Labor Standards Act, to the end that as to overtime penalty wages, that law spoke only from the date of the factual determination by the Commission and could not create retroactive liabilities and penalties as to the particular classes of employees involved. This is the only appellate court case involving this issue.

This ruling is contrary to the long-established procedure which Congress has adopted in similar cases and which has been accepted and followed without question.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

JOHN R. NORRIS,

J. NINIAN BEALL,
Attorneys for Petitioner.

February 7, 1942.

## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

---

### HISTORY OF THIS LITIGATION

This case comes before the Court following a series of legal and administrative proceedings which were necessary for the purpose of determining whether Section 7, the mixmum-hour provisions of the Fair Labor Standards Act, was applicable to Petitioner and Respondent under any circumstances, and subsequently, proceedings were held for the purpose of determining under what circumstances the parties might be subject to the Act.

By way of explanation of the prior proceedings, attention is called to certain exemptions in Section 13(b) of the Act. That Section exempts from the maximum-hour provisions of Section 7, "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act, 1935 (now referred to as the Interstate Commerce Act, Part II)".

Petitioner believed that the Interstate Commerce Commission had power to prescribe qualifications and maximum hours of service for all employees of common and contract carriers under the provisions of paragraphs (1) and (2) of Section 204, and that the Commission's jurisdiction was limited under paragraph (3) of the same Section to private carrier employees whose duties affected safety. That question reached this Court in the case of *United States v. American Trucking Associations, Inc.*, 310 U. S. 534 (May 27, 1940), in which this Court held, by a 5-to-4 decision, that there was no distinction in the

Commission's jurisdiction as between for-hire and private carriers and that the Commission's jurisdiction was limited to employees whose duties affected safety. A petition for re-hearing was denied by this Court on October 14, 1940, 311 U. S. 724.

Following this decision, the Interstate Commerce Commission instituted an investigation to determine which employees had duties affecting safety, and that proceeding before the Commission was known as Ex Parte MC-2 and MC-3, decided March 4, 1941, and reported in 28 M. C. C. 125.

Respondent instituted this suit on October 29, 1940, which, it will be observed, was prior to the determination by the Commission of the question as to whether the duties of a dispatcher affected safety. Petitioner moved to dismiss the suit on the ground that the Interstate Commerce Commission alone had the power to make a factual determination because of the necessity for uniform application throughout the country, and as the proceedings before the Commission had not been completed, Respondent's action was premature.

The District Court overruled the motion for dismissal on February 20, 1941, *Missel v. Overnight Motor Transportation Company, Inc.*, 36 F. Supp. 980. After certain pretrial conferences and agreements with respect to stipulations, the case was argued on its merits before the District Court on April 24, 1941, and was decided July 28, 1941, 40 F. Supp. 174.

It is to be noted that between the date of the decision denying the motion to dismiss on February 20, 1941, and date of hearing on the merits, April 24, 1941, the Commission rendered its decision on March 4, 1941, determining

the status of employees such as Respondent, which fact rendered moot the question as to the jurisdiction of the Court to determine the status of Respondent in advance of a determination by the Commission. However, the date of the Commission's determination remained of great importance because there was presented the question as to whether this factual determination and the legislative proceedings by the Commission spoke for the future or could possibly have the effect of creating retroactive liabilities and penalties under the Fair Labor Standards Act.

Petitioner contended before the Courts below that the overtime penalty wage provisions could not apply to Respondent retroactively from the date of the Commission's factual determination of his status, and Petitioner further contended that the compensation paid Respondent fully complied with the requirements of the Fair Labor Standards Act, even if the overtime wage provisions of Section 7 applied to Respondent.

Both of these contentions were rejected by the Circuit Court. The opinion deals at length with the construction of the terms of Section 7, and while the Circuit Court does not, in the opinion, mention the question as to the effective date of Section 7 to an employee such as Respondent, the Circuit Court did remand the case to the District Court with instructions to enter judgment in accordance with the opinion, and there would seem to be the implication that Petitioner was held liable retroactively because Respondent was not employed by Petitioner at any time subsequent to the determination of the status question by the Interstate Commerce Commission. These significant dates were brought to the attention of the Circuit Court.

**CONSTRUCTION OF SECTION 7—MAXIMUM HOURS**

Under varying facts and circumstances, a number of district and state courts have taken the view that the Fair Labor Standards Act was a minimum wage law which placed a floor below which employer and employee could not go in their wage contractual relations, and that the Act did not otherwise impair the right of contract, for Section 7 had no application to highly paid employees beyond the classes covered by Section 6.

*Fleming v. A. H. Belo* (C. C. A. 5th, 1941), 121 F. (2d) 207;
*Fleming v. Atlantic Co.*, 40 F. Supp. 654;
*Fleming v. Stone*, 41 F. Supp. 1000;
*Gurtov v. Volk*, 11 N. Y. S. (2d) 604;
*Reeves v. Howard County Refining Co.*, 33 F. Supp. 90;
*Schlee v. Lincoln Oil Co.* (C. C. Wayne Co., Mich., 12/31/41), 5 Wage Hour Rept. 72;
*Warren-Bradshaw Drilling Co. v. Hall*, (C. C. A. 5th, 12/9/41), 4 Wage Hour Rept. 695;
*Woods v. Wilkerson*, 40 F. Supp. 131.

Numerous district and state courts have reached a different conclusion and held that Section 7 required the payment of penalty wages for all classes of employees regardless of salary, and with respect to salaried employees paid on a weekly or monthly basis it had the further effect of reforming the contracts by establishing straight time hourly rates in excess of the statutory provisions of Section 6. The principal cases are:

*Bumpus v. Continental Baking Co.* (C. C. A. 6th, 12/10/41), 4 Wage Hour Rept., 692;
*Dubois Soap Co. v. Floyd* (C. A. Ohio, 9/15/41), 4 Wage Hour Rept. 541;

*Fleming v. Carleton Screw Products Co.*, 37 F. Supp. 754;
*Fleming v. Pearson Hardwood Flooring Co.*, 39 F. Supp. 300;
*Haddad v. Beckerman Shoe Corp.* (C. P. Berks Co., Pa. 5/5/41), 4 Wage Hour Rept. 329;
*McLendon v. Bewley Mills* (N. D. Tex. 12/10/40), 4 Wage Hour Rept. 30;
*Muldowney v. Seaberg Elevator Co.*, 39 F. Supp. 275;
*St. John v. Brown*, 38 F. Supp. 385;
*Williams v. General Mills*, 39 F. Supp. 849.

The cases just above recited hold that the "regular rate of pay" is determined by dividing the total number of hours worked in any workweek into the total sum of wages paid. In two recent decisions, a new method of computation has been evolved to determine this mathematical "regular rate", viz.: division of the statutory number of hours provided in Section 7 into the total sum of wages paid.

*Allen v. Moe* (D. C., Idaho, 12/10/41), 5 Wage Hour Rept. 71;
*McClure v. Schulze Baking Co.* (C. C. Winnebago Co., Ill., 11/21/41), 5 Wage Hour Rept. 53.

Three Circuit Courts have passed on some phases of the questions. The general tenor of these Circuit Court decisions has been to extend the coverage of the Act, through Section 7 (maximum hours), to classes of employees not covered by Section 6 (minimum wages). It does not seem possible to reconcile the statements of the Circuit Courts with respect to the private right of contract for compensation in excess of minimum wages, and the actual effect of the decisions as applied to cases involving weekly or

monthly wage contracts exceeding the minimum provisions.

*Bumpus v. Continental Baking Co.* (C. C. A. 6th, 12/10/41), 4 Wage Hour Rept., 692;
*Fleming v. A. H. Belo* (C. C. A. 5th), 121 F. (2d) 207;
*Missel v. Overnight Motor Transporation Co., Inc.* (C. C. A. 4th, 1/5/42), 5 Wage Hour Rept. 25;
*Warren-Bradshaw Drilling Co. v. Hall* (C. C. A. 5th, 12/9/41), 4 Wage Hour Rept. 695.

The Circuit Court of Appeals for the First Circuit, in the case of *Bowie, et al v. Gonzalez, et al.*, 117 F. (2d) 11, at page 18, stated that the Congressional purpose was to raise the wage level of workers in the lowest pay brackets, and through the fixing of a universal minimum wage, to cure and eliminate "the evils of sweat-shop conditions of long hours indoors at low wages."

In the case of *United States v. Darby Lumber Company*, 312 U. S. 100, 125, in which the constitutionality of this Act was in issue, there are expressions which indicate that this Court has considered the Act as being a minimum wage law for the protection of the large group of poorly paid employees, and that the Act did not go beyond that purpose. "Both provisions are minimum wage requirements compelling the payment of a minimum standard wage with a prescribed increased wage for overtime of 'not less than one and one-half times the regular rate' at which the worker is employed."

The provisions of the Act as a whole, and particularly the provisions of Section 6 and Section 8 which so strictly limit its coverage with respect to straight time wages, are sufficient in themselves to challenge any interpretation of

Section 7 which would extend its coverage to all classes of employees regardless of salary. The decisions of this Court are numerous and clear that the primary rule of construction is to determine the intent of Congress and reference to the legislative history of this Act strongly supports the proposition that Congress did not intend to enlarge the class coverage under Section 7 beyond the provisions of Section 6.

It requires but slight familiarity with the legislative history of this Act, which was highly controversial when passed, to conclude that it could not have been passed had Congress suspected that the provisions of Section 7 would would be construed to cover all classes of employees, regardless of salary. The committee reports make it clear that there was no thought on the part of Congress to completely deal with the matter of wages and hours for all employees, but that the purpose of the Act was to make a beginning by extending the arm of federal protection only to that large group of poorly paid employees which obviously were in need of some protection. We presume that it would be more appropriate to offer citations in support of these observations in the trial brief rather than in connection with this petition for writ of certiorari.

## RIGHT OF CONTRACT

In this case there are no disputes with respect to the terms of the employment contract, the essential features of which were covered by Stipulation (R. 17 ). Respondent was employed by Petitioner prior to the passage of the Act and for two years subsequent thereto. He was always employed by the week at a weekly salary. He was the office man at a small truck terminal where the volume of business varied from day to day, week to week, and according to the seasons of the year and change in business

conditions. There was never enough business for an around-the-clock office set-up. During slack periods, the on-duty hours would be as low as 40, possibly less, and during periods of unusual activity, he would have to look after matters which involved being on duty or responsible for results, for as much as 75 hours.

In a limited sense, he was in charge because there was no one present at all times to direct his activities. He knew when the trucks were expected to come and expected to go, and he adjusted his on-duty hours, or presence at the terminal, according to his judgment as to the necessities of the occasion. These were the facts which led to his employment to do a job, as distinguished from employment by the hour or for a particular number of hours per week.

He was entitled to some vacation with pay, and if he was sick or had any other occasion to be absent for reasonable periods, no deductions were made from his salary. In many respects, he might be considered as a minor executive or administrative employee of the kind exempt under Section 13(a) of the Act. But the Administrator was given the power to define administrative and executive employees and under the Administrator's definitions, from time to time, there may be some doubt whether he can be qualified as an executive or administrative employee, because he did a certain amount of detailed work which was not of a strictly administrative or executive nature.

During the two years that the Act was in effect, Respondent never questioned his employment arrangement. The first notice Petitioner had of any claim was this suit which was filed after the employee had resigned to take a better place with another company. The opinions of the Courts below disclose that even when the suit was filed, the employee did not have in mind a definite claim or contention

with respect to any unpaid wages. The bill of complaint, as amended, was in the alternative, on the theory that there might be some possible constructions of the Act which could, in some way, result in a recovery. It was stipulated, by way of illustrating the legal question, that the maximum number of hours for any week or two during the two years he worked after the Act became effective, would be about 75 hours. This was done for an assumed maximum week in order to test the theory of the case.

The contract as it was understood and applied by the parties:

Rate—$27.50 per week.

Short week example: Workweek—slack period—40 hours x 30¢ per hour, minimum wage under Sec. 6 = $12.00 per week. Employer paid additional $15.50 in cash in excess of minimum and gave vacation and sick leave with pay. Consideration for excess payments—availability of trained employee's service for both slack and peak business periods.

Long week example: Workweek of 75 hours at 30¢ per hour under Sec. 6 = $22.50, assuming that Sec. 7 is not applicable because of the exemption in Sec. 13(b).

If Sec. 7 were applicable to Respondent, the agreement would cover a workweek of approximately 75 hours, as follows: 30¢ for 42 hours = $12.60, plus 33 hours at 45¢ = $14.85, or $27.45 per week.

Respondent now says that the contract which the parties made and performed under for two years was null and void by reason of the Fair Labor Standards Act, and that instead of $27.50 per week being compensation for the job and the hours worked, it covered only the statutory work-

week of 42 hours. He claims that his pay is $0.655 per hour ($27.50 divided by 42 hours), or more than twice the minimum wage covered by law, and then demands more money for overtime at penalty rates.

Applying this theory to a workweek of 75 hours, Respondent claims 42 hours at $0.655, or $27.50, plus 33 more hours at one and one-half times $0.655 or $0.982 per hour, or $32.40. He adds the sum of $32.40 to the $27.50 per week which was paid, making a total of $59.90 per week, and then claims an additional penalty of $32.40 per week, making a total of $92.30 per week. To this total is added attorney's fees and costs.

Respondent now says, as one of his alternative claims, that instead of $27.50 per week being compensation for the job and the hours worked, the payment covered only straight time pay for these hours of work, and that no penalty wage, required by law, was paid for the overtime hours. The Circuit Court adopted this latter view.

For straight time and overtime, this employee was always paid in excess of the wage prescribed by the Act, and during the short weeks he received greatly in excess of the hourly rates fixed under the Act. It is said, by the Administrator, that an employer may not average the compensation given an employee over more than one week, and even if that be so, in this case, Petitioner contends that the law was fully complied with for every week computed separately.

There is nothing in the Act which appears to prevent the making of wage contracts on a lump sum basis. However, the Circuit Court decided that if a man is employed by the week, at a flat weekly salary, the employer at the end

of the week must divide the total number of hours worked into the total compensation paid, thereby determining for the first time his straight time pay. Thereupon, the employer is necessarily further indebted to the employee for the overtime hours at one and one-half times the straight time wage so determined. This ruling prohibits a weekly or monthly salary agreement with any kind of an employee subject to the Act, to cover indefinite hours, even though the lump sum salary exceeds straight time minimum wages under Section 6 and overtime wages measured by Section 6 standards.

This construction given the Act has a two-fold effect. It not only extends the coverage of the Act to classes of employees above the minimum wage classes and compels the payment of overtime at penalty rates on wages far in excess of minimum wages, but it has the further effect of reforming contracts so as to establish straight time wages in excess of those fixed by Section 6. For example:

If the employee was paid $27.50 per week and worked 50 hours, his straight time hourly rate would be determined by dividing 50 hours into $27.50, which produces $0.55 per hour or 83% in excess of the maximum straight time rate prescribed under Section 6. Nevertheless, the employer would still owe the employee the penalty rate under Section 7 for 10 hours to the extent of an additional 50% of this so-determined straight time rate.

So, we not only have the question as to whether Section 7 covers employees in the high-salaried brackets, but we have the further result that the straight time wages are raised far in excess of the limitations placed in the Act by both Sections 6 and 8.

This statement of the problem is probably sufficient to acquaint the Court with the importance of the case and the necessity for a determination of these issues, which are obviously of great national interest. Other questions involving conflicting advice and rulings by the Administrator, and compliance with the Federal Registry Act, 44 U. S. C. A. 301, et seq., we feel, may more appropriately be left for the trial brief.

## PENALTIES UNDER THE ACT

Section 16 of the Act covers penalties. Section 16(a) deals with penalties which may be inflicted by the sovereign and Section 16(b) covers penalties which may be recovered by employees. It will be observed that if the sovereign inflicts the penalties, the violation must be wilful, although the limitation of "wilful" was omitted from Section 16(b).

The theory of penalties usually contemplates a public purpose rather than a private purpose. Whether some public purpose is to be served by limiting the sovereign's right to inflict penalties where the violations were wilful and not so limited when the penalty is inflicted by a private suit, would seem to be open to question.

Comparing the penalty provisions of the Fair Labor Standards Act with those of numerous other acts which have come before this Court, it does not appear that there is any difference in the discretionary powers of the Court when parties have, in good faith, sought to have their rights and liabilities determined.

It is difficult to see how there could be any difference, in view of the numerous clear and positive expressions of this Court with reference to the "due process" provisions

of the Constitution. While a full discussion of the decisions may appropriately be left for trial brief, the comment of a federal court in considering the penalty provisions of the Gold Reserve Act, clearly states the law as laid down by this Court in numerous cases: "Though defendants should not prevail in such a suit, proceedings instituted in good faith to test rights have never, to our knowledge, been followed by the imposition of penalties, fines, or imprisonment." *Uebersee Finanz-Korporation, etc. v. Rosen*, 83 F. (2d) 225 (1936).

This has been the uniform ruling of this Court and the lower courts involving numerous other acts in numerous cases. Among the more important acts is the so-called "Seamen's Act," 46 U. S. C. A. 596, which prescribed certain penalties for withholding wages. This penalty question was passed upon in a great number of cases, some of which are:

*Franco, et al. v. Seas Shipping Corp.*, 272 Fed. 542 (D. C., Md., 1921);
*Meyer v. Dollar S. S. Line*, 43 F. (2d) 425 (D. C., Wash., 1930);
*O'Hara, et al. v. Luckenbach S. S. Co.*, 16 F. (2d) 681 (C. C. A., 1926);
*Pacific Mail S. S. Co. v. Ed. Schmidt*, 241 U. S. 245 (1916);
*The Silver Shell*, 255 Fed. 340 (D. C., N. Y., 1918);
*The Geo. W. Wells*, 118 Fed. 761 (D. C., Mass., 1902);
*The Cubadist*, 252 Fed. 658 (D. C., Ala., 1918).

The provisions of the Federal Trade Commission Act with respect to penalties were passed on in *Federal Trade Commission v. Millers National Federation*, 23 F. (2d) 968 (1927).

Numerous state acts involving penalties have been reviewed by this Court:

*Chesapeake & Ohio Ry. Co. v. Conley*, 230 U. S. 513 (1912);
*Ex Parte Young*, 209 U. S. 123 (1908);
*Oklahoma Operating Co. v. Love, et al.*, 252 U. S. 331 (1920);
*St. Louis, Iron Mountain & S. Ry. Co. v. Williams, et al.*, 251 U. S. 63 (1919);
*Wadley Southern Ry. Co. v. Georgia*, 235 U. S. 651 (1915).

In all of these cases, it was held that the infliction of penalties during the period of good faith litigation would be in conflict with the "due process" provisions of the Constitution.

In the case of *The Sunshine Anthracite Coal Co. v. Homer M. Adkins*, 310 U. S. 381 (1940), this Court continued the protection of a good faith litigant to the time of denial of petition for re-hearing.

The ruling of the Court below which inflicted penalties to be recovered by a private party, retroactively and during the period of good faith litigation, is believed to be in the teeth of the established law governing the question.

It might be added that the good faith of Petitioner in litigating these issues has never been questioned; the Circuit Court had this to say: "It seems a keen injustice for employers bewildered by strange legislation and confused by divergent authorities in the courts, to be subjected to such a measure." However, that Court made no effort to distinguish the Fair Labor Standards Act from the other acts in connection with which this Court has held that penalties could not be inflicted during good faith litigation. The fact that this Court divided 5 to 4 on one of the controlling issues in this case—whether penalty wage provisions of the Act applied to the motor carrier industry

at all—is clearly indicative of the *bona fides* of the litigation. *United States v. American Trucking Associations, Inc.*, 310 U. S. 534.

## DUAL FUNCTIONS OF THE ADMINISTRATOR AND THE INTERSTATE COMMERCE COMMISSION

Section 13(b) of the Fair Labor Standards Act exempts certain transportation employees from the overtime wage provisions of Section 7. The Interstate Commerce Commission is charged with the duty of determining which employees have duties affecting safety, and this fact, in turn, establishes the non-coverage of Section 7 as to transportation employees.

The Commission's jurisdiction is broader than the mere matter of hours, because it also is required to establish qualifications of employees.

We take the view that action by the Commission is necessary to implement the Fair Labor Standards Act as to transportation employees. Congress well understood the necessity for uniform treatment of transportation matters involving interstate commerce and knew that the Commission and not the Administrator was the proper body to make these determinations. The Commission fixes rates, determines the income of the carriers, and necessarily must lead and not follow in cases of this kind. The Commission conducted an exhaustive investigation which required time before it determined which employees were engaged in duties affecting safety. Petitioner contended that the determination by the Commission fixed the date for the application of Section 7 of the Fair Labor Standards Act. The Courts below ignored these questions in the opinions although they were presented and argued.

In delegating to the Interstate Commerce Commission jurisdition to make the necessary determinations, which

in turn affects the coverage of the Act, Congress merely followed a long-established procedure under numerous Railroad Labor Acts. The coverage in these statutes was contingent upon a determination by the Commission of classes of railroads, such as the distinction between steam roads and interurban lines, etc. These laws were mandatory upon the carriers, but they were not effective in doubtful cases until they were implemented by findings by the Interstate Commerce Commission. After the findings were made, they spoke for the future with respect to the status of carriers, but, in no cases have such findings been made retroactive.

In a number of cases involving the construction of statutes administered by the Interstate Commerce Commission, this Court has held that the necessity for uniform rulings was an essential part of the scheme of regulation of interstate transportation and such uniformity can only be established by the Commission and cannot be established by the courts.

*Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 U. S. 285;
*Mitchell Coal & Coke Co. v. Pennsylvania R. R.*, 230 U. S. 247;
*Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426.

It is unfortunate that in this case the Courts below did not discuss the question, because insofar as Petitioner is concerned, it is of vital importance.

The Administrator has taken the view that all employees subject to this dual jurisdiction are subject to the Fair Labor Standards Act until the Commission has acted; in other words, his view is that the function of the Commission is to determine an exemption to be applicable from the date of determination rather than to implement the application of the law for the future. This view, we think,

would be inconsistent with the duties of the Commission in its regulatory power over transportation agencies and is certainly in conflict with the decisions of the district courts which have had occasion to consider the matter in connection with this Act.

*Bechtel v. Stillwater Milling Co.*, 33 F. Supp. 1010;

*Faulkner v. Little Rock Furn. Mfg. Co.*, 32 F. Supp. 590;

*Gerdert v. Certified Poultry & Egg Co.*, 38 F. Supp. 964;

*Gibson v. Wilson* (D. C., Tenn., 3/20/41), 4 Wage Hour Rept., 259;

*Tinerella v. Des Moines Transp. Co.*, 41 F. Supp. 798;

*West v. Smoky Mountains Stages, Inc.*, 40 F. Supp. 296.

## CONCLUSION

The issues involve questions of national economics of far-reaching importance, with particular reference to transportation. Congress has given recognition to transportation problems in the numerous exemptions contained in Section 13. The decision of the Circuit Court would greatly impair the operating efficiency of transportation agencies if they be unnecessarily subjected to penalty overtime wages under rigid rules which may be appropriate for fixed plant operations.

Direct labor costs represent 50% of the operating expenses of common carriers by motor vehicle and the margin between operating expenses and gross income averages 3% for the nation. The undetermined potential increase in labor costs depending upon the final determination of the questions presented here, exceeds the present and past operating margin under the rates published with the Interstate Commerce Commission. The potential cumulative

retroactive wage claims, together with statutory penalties, if applied during the period of more than two years of uncertainty and conflicting decisions, equal a substantial portion of the assets of the industry as a whole and exceed the assets of a great many individual carriers. The speedy determination of the questions is necessary in connection with the solvency of the industry.

Numerous labor contracts with the American Federation of Labor are at variance with the interpretations placed on the Act by the Wage-Hour Administrator and some of the courts, and the industry is unable voluntarily to reconcile the conflicting views.

If this petition be granted it is the purpose of Petitioner to move for an advancement of the hearing on this case to the date which will be fixed for argument in other cases involving the Act which are now before the Court. It is believed that the facts and rulings in this case may be helpful to the Court in considering the questions in their practical application.

Wherefore, it is respectfully submitted that the wide conflict now existing among decisions of numerous state and federal courts will not be reconciled until the opinion of this Honorable Court has been rendered, and that therefore this Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

JOHN R. NORRIS,
Baltimore, Maryland,

J. NINIAN BEALL,
Washington, D. C.,

Attorneys for Petitioner.

February 7, 1942.

# APPENDIX

## STATUTORY PROVISIONS.

The pertinent statutory provisions are as follows:

FAIR LABOR STANDARDS ACT of 1938, c. 676, 52 Stat. 1060 et seq., 29 U. S. C. A. 201, et seq.:

"Finding and Declaration of Policy

"Sec. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

"(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."

* * * * * * *

"Minimum Wages

"Sec. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the

production of goods for commerce wages at the following *rates*[1]—

"(1) during the first year from the effective date of this section, not less than 25 cents an hour,

"(2) during the next six years from such date, not less than 30 cents an hour,

"(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the *rate* (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under Section 8, whichever is lower, and

"(4) at any time after the effective date of this section, not less than the *rate* (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8."

* * * * * *

"Maximum Hours

"Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

"(2) for a workweek longer than forty-two hours during the second year from such date, or

"(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a *rate* not less than one and one-half times the regular *rate* at which he is employed."

* * * * * *

[1] Italics inserted.

"Wage Orders

"Sec. 8. (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum *rate* or *rates* of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

"(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage *rate* or *rates* to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage *rates* for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

"(c) The industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage *rate* (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage *rate* which

the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage *rates* for such classifications, no classification shall be made, and no minimum wage *rate* shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

"(1) competitive conditions as affected by transportation, living, and production costs;

"(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

"(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry."

* * * * * *

"Exemptions

"Sec. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); . . ."

"(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part 1 of the Interstate Commerce Act."

* * * * * *

"Penalties

"Sec. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

"(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . . The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

* * * * * *

INTERSTATE COMMERCE ACT, PART II (formerly Motor Carrier Act, 1935), c. 498, 49 Stat. 546 et seq., 49 U. S. C. A. 301, et seq.:

"General Duties and Powers of the Commission

"Sec. 204. (a) It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.[2]

[2] Subsection (2) contains similar provision as to contract carriers.

"(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term 'motor carrier' shall be construed to include private carriers of property by motor vehicle in the administration of Sections 204(c); 205; 220; 221; 222(a), (b), (d), (f), and (g); and 224."